92-1146
No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

October Term, 1991

**JAMES GARLAND POWELL,**
*Petitioner,*

versus

**UNITED STATES OF AMERICA,**
*Respondent.*

# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

ROBERT G. FIERER
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## QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court erred in improperly instructing the jury about Petitioner's claim of right defense and the mens rea element of the Hobbs Act violation?

II. Whether Petitioner was effectively denied due process of law and deprived of his Sixth Amendment right to confrontation as the trial court repeatedly stripped Petitioner of the opportunity to fully cross-examine an unindicted co-conspirator?

III. Whether the trial court curtailed the defense from introducing competing theories of the case and thereby infringed on Petitioner's Fifth Amendment right against self-incrimination?

## CERTIFICATE OF INTERESTED PERSONS

Trial Judge:

The Honorable Orinda D. Evans
United States District Court for the Northern District of Georgia

Assistant United States Attorney:

William McKinnon

Appellant and Counsel:

James Garland Powell, represented by Robert G. Fierer, Esquire, on appeal.

Steven Ludwick, Esquire, and Larry J. White, Esquire, trial counsel.

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## OPINION BELOW

Petitioner was convicted after a jury trial in United States District Court for the Northern District of Georgia, Atlanta Division, on May 25, 1990, and sentenced on August 16, 1990. Petitioner appealed his conviction to the Eleventh Circuit Court of Appeals which affirmed on November 5, 1991, in a per curiam opinion.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. Section 1254. This is a direct appeal of a criminal conviction and sentence in the United States District Court for the Northern District of Georgia, Atlanta Division, affirmed in the Eleventh Circuit Court of Appeals on November 5, 1991.

## STATUTORY PROVISIONS INVOLVED

18 U.S.C. Section 1951.

## STATEMENT OF THE FACTS

James Garland Powell, Petitioner, was an established, well- respected, semi-retired businessman who continued to work as a consultant to his family's business until shortly before his arrest. On November 20, 1989, a federal grand jury in the Northern District of Georgia returned an indictment charging Petitioner, along with William H. Armistead and an unindicted co-conspirator, with conspiracy to extort $35,000.00 from Jim Franklin, in violation of Title 18, United States Code, Section 1951, the Hobbs Act.

In mid-1989, Jim Franklin and Michael Britt, commercial real estate brokers, entered into preliminary negotiations relating to a corner piece of property in Dekalb County, Georgia. Specifically, Franklin and Britt needed to obtain commercial zoning for a corner piece of property which was then zoned residential. (R2-80, 81) Franklin had attempted to get the property re-zoned through sub-

mitting an application to the City of Clarkston planning commission. (R2-83) However, Franklin had run into obstacles as the commission was opposed to such a change in zoning. (R2-83, 90) At this point, Franklin retained the services of an attorney, Terri Candler, who resubmitted the application. (R2-83, 91) Candler resubmitted the application with "legal information" (R2-91) and gave a presentation to accompany the application. (R2-92) Despite this effort, Franklin eventually learned that the commission recommended disapproval of the request to re-zone this corner lot. (R2-92)

Myron Baynes, another real estate broker, then suggested to Franklin that he contact Petitioner for assistance in his re-zoning matter. (R2-94) Franklin telephoned Petitioner (R2-94) and made an appointment to meet him the following day. (R2-95) At this meeting Franklin explained to Petitioner the problems he was experiencing with the re-zoning matter. (R2-97) The two

also agreed on a fee of $35,000 for Petitioner's assistance in obtaining the re-zoning. (R2-98) Ultimately, Franklin and Petitioner entered into a contractual agreement which set forth the fee of $35,000 to secure re-zoning.

Although there were lengthy discussions about the payment schedule, it was finally agreed that Franklin would deliver Petitioner a post-dated check. (R2-129) In reality, this check was written by the District Attorney's office of Dekalb County, Georgia, on an account which was under their control. (R2-129) The money was to be held in escrow by Attorney James Howard. The contract further provided that in the event the property was not re-zoned, Franklin would receive the fee back, less $500.00, presumably for administrative expenses. (R2-101) Petitioner assured Franklin that he would not do anything illegal or unethical. (R2-99) Franklin proceeded to inform his attorney about his meeting with Petitioner. (R2-100) At this point Franklin gave his attorney permission

to contact the Dekalb County District Attorney's Office. (R2-100) Franklin agreed to cooperate with the authorities, and allowed his phone to be tapped. (R2-105) Subsequent conversations between Petitioner and Franklin were recorded. (R2-120)

Contemporaneously, Petitioner met with Steven Pavuk, a business associate and professional friend who served as the Clarkston City Attorney. Petitioner explained Franklin's situation to Pavuk and Pavuk, who was somewhat familiar with the case, added what information he knew about the matter. (R8-1349) What Pavuk knew was particularly relevant to Petitioner's participation in the re-zoning matter as it related to Franklin and Britt's attorney, Terri Candler. Pavuk informed Petitioner that Candler had threatened the Planning Commission with litigation, and that in Pavuk's estimation, such a suit would likely be costly and probably prevail on the merits. (R5-694-697) This indicated to Petitioner that the Com-

mission would seriously review Franklin and Britt's application for re-zoning.

Independently, that is without Petitioner's knowledge or assistance, Pavuk contacted Clarkston City Councilman William Armistead, and allegedly offered him a sum of money if he would vote in favor of re-zoning Franklin's property. (R3-375, 380) Pavuk allegedly related to Armistead that he could make money off of this transaction. (R3-376) Pavuk himself, also intended to make a great deal of money on the transaction. (R5-606)

As the District Attorney began investigating this matter, it came across strong evidence of Pavuk's corruption. The District Attorney's office then approached Pavuk and gained his cooperation in the investigation. Pavuk, like Franklin, began recording all conversations which took place between him and Petitioner, and him and Armistead. (R5-693 ) The conversations between Pavuk and Petitioner are confusing at best, because the two

discuss several of their ongoing business transactions relating to outdoor billboards.

The re-zoning application was unanimously approved on July 11, 1989. (R2-128; R3-382) Armistead indeed voted for the re-zoning. Thereafter, Petitioner sought full payment of the $35, 000 from Franklin — the amount specified pursuant to their contract. Franklin informed Petitioner that he did not have the money. Petitioner, angry that his contract was not honored, threatened Franklin with litigation and denial of issuance of building permits. Although Powell did not have the power to influence any decisions relating to the issuance or denial of building permits, he did indeed sue Franklin for the $35,000.00. (R2-142, 143) For his cooperation, Pavuk entered into a plea agreement which called for him to plead guilty to state, not federal charges. (R4-434-444)

## STATEMENT OF THE CASE

On November 20, 1989, a federal grand jury returned an indictment charging James Garland Powell, Petitioner, William H. Armistead, and unindicted co-conspirator Steven M. Pavuk with conspiracy to extort money from one Jim Franklin in violation of 18 U.S.C. Section 1951. A joint trial of Petitioner and Armistead was held from May 15-25, 1990, before the Honorable Orinda Evans in the Northern District of Georgia, Atlanta Division.

At trial, the government relied primarily on the testimonies of co-conspirator/informant Steven Pavuk and Jim Franklin, tape recorded conversations between Franklin and Petitioner, and tapes made by Pavuk of his conversations with Petitioner and Armistead. Petitioner testified on his own behalf as did Armistead. Additionally, both defendants put on a substantial number of character witnesses. The jury returned a verdict of guilty

as to both defendants. (R10-1751) Both Petitioner and Armistead were sentenced on August 16, 1990. Petitioner's Motion for Bond pending appeal was denied by the trial court on September 25, 1990 (R-61, 63) and the Court of Appeals for the Eleventh Circuit on October 30, 1990. (R-70)

Petitioner's conviction was affirmed by the United States Court of Appeals for the Eleventh Circuit on November 5, 1991, in a per curiam opinion. Petitioner is presently incarcerated in the Atlanta Prison Camp and has been since his voluntary surrender on October 19, 1990.

## ARGUMENT AND AUTHORITY

### I. THE COURT ERRED IN IMPROPERLY INSTRUCTING THE JURY ABOUT PETITIONER'S CLAIM OF RIGHT DEFENSE AND THE MENS REA ELEMENT OF THE HOBBS ACT VIOLATION.

Throughout Petitioner's trial, and in fact during the investigatory and pretrial phases of this case, Petitioner adamantly asserted a claim of right defense to the money owed to him by Franklin and Britt. The claim of right defense originated in United States v. Enmons, 410 U.S. 396 (1973). In Enmons, the defendants were charged with attempting to obtain higher wages and other benefits for striking utilities employees through the wrongful use of actual force and violence. The strikers allegedly employed violence and other coercive tactics to exact wage increases from their employer. The issue before the Supreme Court was whether the term "wrongful" in the statute applied to the means or the ends sought by the alleged extortioner. Id. at 399. The Court definitively

stated that "wrongful has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." Id. at 400. This reasoning created the claim of right defense to charges of extortion under the Hobbs Act. Although this case applied to the labor context, broader applications have been addressed. See e.g., United States v. Sturm, 870 F.2d 769 (lst Cir. 1989).

In Sturm, the defendant was charged with attempted extortion in violation of the Hobbs Act, 18 U.S.C. Section 1951. Defendant Sturm had obtained a substantial loan from a bank to purchase an aircraft and he secured the loan by granting the bank a security interest in the aircraft and other related collateral, including the plane's log-books. The logbooks of the plane's repairs and maintenance were of value to the lender, as a plane accompanied by logbooks is worth substantially more than one without

the records. Id. at 770. When the bank repossessed the aircraft after defendant defaulted on the loan, the log-books were not likewise obtained. However, after an unsuccessful attempt to sell the plane at an appropriate price, the bank later asked defendant for production of the logbooks, to which defendant repeatedly replied that he could get them "for a price." Id.

Defendant raised the claim of right defense, asserting that he had a right to possession of the log books. Id. at 772. Although the court disagreed with defendant on this ground, it expounded on the claim of right defense in the context of extortion under the Hobbs Act, 18 U.S.C. Section 1951. The court distinguished extortion cases based on the use of force and violence from those based on the use of economic fear. In the latter, "it is self-evident that a defendant cannot be found guilty of wrongfully obtaining property through the use of a legitimate economic threat if he has a claim of right to the property." Id.

at 773. Arriving at its holding, the court concluded that for purposes of the Hobbs Act, the use of legitimate threats to obtain property is wrongful only if the defendant has no claim of right to that property. In the extortion context, a violation of the Hobbs Act requires the use of economic threat to procure property. United States v. Kattar, 840 F.2d 118 (lst Cir. 1988). Such a threat is not per se illegal, as a legal right to funds or property at issue may justify the threat of pecuniary harm. United States v. Clemente, 640 F.2d 1069 (2nd Cir. 1981). A straightforward example of a lawful economic threat is where one party threatens litigation in order to persuade another party to honor a contract which the first party believes has been breached. The first party's subjective belief is critical to this analysis. Take the hypothetical scenario set forth in Sturm:

> "Two parties, A and B, enter into a contract. A sincerely believes that B has breached the contract, and threatens litigation unless B abides by A's interpretation of the contract. B refuses to do so, and the judgment in the ensuing lawsuit indicates

> that B had not breached the contract. May A then be convicted of attempted extortion based on the threat of litigation?"

870 F.2d at 774.

In this scenario, the Sturm court concluded that A may not, as a matter of law, be convicted. Even though A had no objective right to the contractual entitlement sought, the threat does not amount to attempted extortion because A subjectively thought he had a right to the contractual entitlement. United States v. Aguon, 851 F.2d 1158 (9th Cir. 1988)(en banc); United States v. Arambaisch, 597 F.2d 607 (7th Cir. 1979). It would be a miscarriage of justice to convict A of extortion when he legitimately lacked the intent by virtue of a claim of right to the goods or property sought.

The Hobbs Act also requires proof of intent to commit the offense. The requisite mens rea must be explained to the jury in an adequate jury instruction. Aguon at 1168.

> A fortiori, criminal intent must be submitted to the jury in a case charging extortion under the Hobbs Act . . . The corrupt intention must be proved to the crime. The court's failure to give an instruction on a vital element of the crime [is] plain error.

Id.

Sturm requires that the government prove beyond a reasonable doubt that Petitioner did not have a claim of right to the property in question. Sturm at 774. Additionally, the government must prove, at a minimum, that defendant knew he was not legally entitled to the property. Id. Thus, the government must prove, beyond a reasonable doubt that a defendant had the intent to obtain goods or property to which he knew he was not legally entitled.

Petitioner embraced the claim of right defense by arguing that pursuant to a legal agreement he was employed to perform legitimate services for the developers and consequently was owed the fee derived therefrom. (R2-43) The trial court, however, delivered a fatally

defective jury instruction regarding the state of the law on the claim of right defense. Petitioner's counsel objected to the error, but no curative or ameliorative measures were taken. The court had defined "wrongful" in the following way:

> The term wrongful means to obtain money unfairly and unjustly by one having no lawful claim to it, and who knows in his own mind that he does not have a lawful claim to it.

(R10-1720)

Petitioner's counsel argued to the court in opposition:

> ...Also, when you defined the word wrongful, you used the word unfairly, but it is not against the law to do something that is unfair,and I think the jury can find what Mr. Powell did in the business world may have been unfair, perhaps unethical, but it shouldn't be unlawful.

(R10-1749-1750)

In the context of Sturm, the propriety of the above jury instruction wanes. Moreover, the error is compounded by the fact that, as a matter of law, the government did not

prove beyond a reasonable doubt that Petitioner did not have a claim of right, that he intended to illegally obtain those goods or property nonetheless. Sturm, at 774.

Petitioner had entered into a contract with Franklin, which he felt was legally binding. Thus, he subjectively held a reasonable belief that if the rezoning passed, which it did unanimously, that his consulting fee would be earned. When Franklin refused to pay Petitioner, Petitioner, a business man, attempted to use coercive techniques. These techniques fall squarely within those existing in Enmons when a claim of right is asserted. Further, Sturm insulates Petitioner as he lacked any subjective intent to obtain anything to which he was not legally entitled. (R10-1749-1750)

The trial court's instruction was such that the jury could and may have concluded that Petitioner was guilty of attempted extortion even if it found credible his claim that he sincerely believed he was legally entitled to a fee

for his services. This conclusion would be clearly erroneous, because the mens rea element is lacking. Thus, the government was relieved of meeting its burden of proof of the subjective intent of the accused. The trial court's instruction was clearly erroneous and had a prejudicial impact on the jury's consideration of Petitioner. This error requires reversal of Petitioner's conviction.

## II. PETITIONER WAS EFFECTIVELY DENIED DUE PROCESS OF LAW AND DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION AS THE TRIAL COURT REPEATEDLY STRIPPED PETITIONER OF THE OPPORTUNITY TO FULLY CROSS-EXAMINE AN UNINDICTED CO-CONSPIRATOR.

It is principally through cross-examination that a defendant exercises his right to confront witnesses called to testify against him. The right to cross-examination under the Sixth Amendment is a fundamental right and may not be improperly restricted. U.S. Const. amend VI. Any unreasonable limitation placed on this constitutional

guarantee requires reversal of the underlying conviction. United States v. Barkowitz, 662 F.2d 1127 (5th Cir. 1981); United States v. Haimowitz, 706 F.2d 1549 (11th Cir. 1983). This right is especially important with respect to accomplices or witnesses cooperating with the government who provide an essential link in the prosecution's case. United States v. Greenberg, 423 F.2d 1106 (5th Cir. 1970); United States v. Barrentine, 591 F.2d 1069 (5th Cir. 1979).

While the scope of cross-examination with respect to an appropriate subject of inquiry is within the discretion of the court, a court abuses its discretion when it excludes matters vital and proper to the defense of the accused. The court's discretion includes confining the scope and extent of cross-examination to relevant and material matters. However, there is a "sphere which a trial judge may not impinge". United States v. Tolliver, 665 F. 2nd 1005, 1008 (11th Cir. 1982).

In Beaudine v. United States, 368 F.2d 417 (5th Cir. 1966), the old Fifth Circuit reversed defendant's conviction because the trial court had improperly sustained objections to cross-examination. Defendant had been charged with taking kickbacks from a contractor in violation of 18 U.S.C. Section 1006. The primary witness who testified for the government had confessed he was a three or four-time convicted felon. His credibility, both from the standpoint of moral trustworthiness and recollection, was, therefore, of critical, decisive importance. Beaudine at 421. In Beaudine, the appellate court noted that "at least twice, under objections made by government counsel so frequently throughout the whole record as to almost defy the orderly development of any particular fact or thread, the trial court severely restricted cross-examination." Beaudine at 421.

In the case at bar, Petitioner was physically able to cross-examine Pavuk at trial. This, however, does not

automatically insure that he was not denied his constitutional right to confrontation. Dorsey v. Warden Southern Michigan and State Prison, 523 F.2d 590 (6th Cir. 1975). Rather, the test is whether the opportunity existed to cross-examine the witness. In the case at hand, the Court sharply limited the scope and extent of Petitioner's cross-examination of unindicted co-conspirator/informant Steven Pavuk. In doing so, the Court deprived Petitioner of the opportunity to effectively cross-examine Pavuk with respect to relevant and material issues.

Specifically, Petitioner sought to elicit information from Pavuk concerning the nature of the billboard transactions and dealings he personally had with Petitioner. This information was critical to dispel the "guilt by association" linkage that had been established when the prosecution questioned Pavuk both about billboard dealings with Powell, and separate billboard dealings with Armistead. The dealings with Armistead were the basis

for Armistead's conviction on Count Two. When a witness is so critical to the government's case, the importance of a full cross-examination to disclose bias is necessarily increased. United States v. Summers, 598 F.2d 450 (11th Cir. 1979).

This information was well within the scope of cross-examination, as the inquiry was structured to address issues the prosecution had first exposed. Additionally, this line of questioning was material and relevant, for Pavuk was an unindicted co-conspirator turned informant whose posture, bias and credibility were clearly in question. Summers, 598 F.2d 450. This testimony went to the heart of the impeachment of Pavuk and was critical to the defense. Although Petitioner was able to partially impeach Pavuk through alternate lines of inquiry, mainly the contents of his plea bargain, this did not adequately afford Petitioner the necessary latitude to fully impeach the witness' credibility and explain his perceptions vis-a-

vis Powell's. The want of full impeachment of Pavuk resulted in affirmative prejudice against Petitioner.

## III. THE TRIAL COURT CURTAILED THE DEFENSE FROM INTRODUCING COMPETING THEORIES OF THE CASE AND THEREBY INFRINGED ON PETITIONER'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

In this case, the Court developed a theory of the case and sharply curtailed the defense from introducing any competing theories. The Court's predisposition was evident throughout trial and manifested into a systematic denial of Petitioner's due process rights. Although it is within the Court's province to direct the jury's fact finding quest, the trial court is not endowed with the power to restrain the Petitioner's introduction of a relevant, material defense theory. For example, the trial court evidenced its posture toward Petitioner's defense theories when it stated:

> COURT: I'm not going to allow you to develop your theory that Mr. Powell understood they were talking about billboards unless and until there is some foundation for that. That's what you are trying to do at this point. You are trying to circumvent the ruling I made. You need to stop now and go on to something else.

(R5-574)

In the case at hand, the trial court excised Petitioner's available defenses and then compounded this error by creating a set of circumstances by which he had to forfeit his Fifth Amendment right against self incrimination. At one juncture during the cross-examination of Stephen Pavuk, the following colloquy took place when Petitioner's counsel attempted to pursue a series of questions going to the heart of his client's defense:

> COURT: . . . Why wouldn't it make more sense for these questions to be asked after Mr. Powell has given his testimony that you anticipate he will be giving?
>
> MR. LUDWICK: We haven't made that determination first of all, and second, we have him on

cross-examination. He has already testified to these things.

(R5-566)

COURT: Right. Well, wouldn't it promote the jury's understanding of the case for this line of questioning to be deferred until after Mr. Powell has given his testimony?

MR. LUDWICK: What if Mr. Powell isn't going to testify?

COURT: Then it might not be a germain line of inquiry.

(R5-567)

Systematically, the Court made rulings so as to deny Petitioner the opportunity to present his defenses. Additionally, the Judge conditioned the inquiry into certain relevant areas on Petitioner's decision to take the stand and testify. These rulings and determinations by the Court rise to the level of constitutional error as they deprived Petitioner of his right to a fair trial and due process of law.

WHEREFORE, Petitioner requests this Honorable Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

ROBERT G. FIERER
Attorney for Petitioner
Georgia State Bar No. 259700

152 Nassau Street, N.W.
Atlanta, Georgia 30303
(404) 688-5500

## CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing Petition for Writ of Certiorari upon the following:

Mr. William McKinnon
Assistant United States Attorney
1800 U.S. Courthouse
75 Spring Street, N.W.
Atlanta, Georgia 30303

Solicitor General
Department of Justice
Washington, D.C. 20530

by depositing a copy of same in the United States Mail with adequate postage affixed thereon.

This 3rd day of February, 1991.

_____
ROBERT G. FIERER

# APPENDIX

United States District Court for the
Northern District of Georgia
Judgment Including Sentence Under
The Sentencing Reform Act

United States Court of Appeals for
the Eleventh Circuit Opinion

United States Court of Appeals for
the Eleventh Circuit Judgment

# United States District Court

Northern District of Georgia

| | |
|---|---|
| United States of America<br>V.<br>James Garland Powell | Judgment Including Sentence Under The Sentencing Reform Act |
| **(Name of Defendant)** | Robert G. Fierer<br>**Defendant's Attorney** |

THE DEFENDANT:

☐ pleaded guilty to count(s)_____.
☐ was found guilty on count(s) one after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| | |
|---|---|
| **Title & Section** | Title 18, U.S.C. |
| **Nature of Offense** | Conspiracy to Commit Extortion |
| **Count Number(s)** | One |

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such counts.
☐ Count(s) (is) (are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☐ It is ordered that the defendant shall pay to the United States a special assessment of $_____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

**Defendant' Soc. Sec. Number:**
256-34-2175

**Defendant's Mailing Address:**
3573 Dial Drive
Stone Mountain, Georgia 30083

**Defendant's Residence Address:**
- same as above -

**Date of Imposition Sentence**
August 16, 1990

_____
**Signature of Judicial Officer**

Orinda D. Evans
United States District Judge
_____
**Name and Title of Judicial Officer**

_____
**Date**

**Defendant:** James Garland Powell
**Case Number:** CR89-433-01A

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of thirty-nine (39) months .

☐ The Court makes the following recommendations to the Bureau of Prisons:
That the Atlanta Prison Camp be designated as place of service of this sentence.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district

___ a.m.
☐ at ___ p.m. on _____.
☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

## RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____
to _____ at _____,
with a certified copy of this Judgment.

_____
United States Marshal

by_____
Deputy Marshal



**Defendant:** James Garland Powell
**Case Number:** CR89-433-01A

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall

comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant shall pay at least $5,000 each month toward any unpaid balance of the fine.

The defendant shall be prohibited from possessing a firearm or other dangerous weapon.

The defendant is prohibited from incurring new credit charges or opening additional lines of credit without approval of the Probation Officer until the fine has been paid in full.

The defendant shall provide the Probation Officer requested financial information until the fine has been paid in full.

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling training, or other acceptable reasons;

7) the defendant shall notify the probation officer with seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other con-

trolled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

**Defendant:** James Garland Powell
**Case Number:** CR89-433-01A

## FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $75.000.00, consisting of a fine of $75.000.00 and a special assessment of $50.00.

☐ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

This sum shall be paid ☐ immediately.
☐ as follows:
as directed by the Probation Office.

☐ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 90-8871
Non-Argument Calendar

District Court Docket No. 1:89-CR-433-01

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES GARLAND POWELL,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Georgia

November 5, 1991

Before HATCHETT, EDMONDSON and DUBINA,
Circuit Judges.

**PER CURIAM:**

Appellant was tried and convicted of conspiracy to extort in violation of the Hobbs Act, 18 U.S.C S. 1951. He appeals both conviction and sentencing. We AFFIRM.

First, appellant argues that the district court erred in instructing the jury on the claim of right defense and the mens rea element of the Hobbs Act. In particular, appellant complains that the instruction that "wrongful" means to obtain money "unfairly and unjustly" encompasses behavior which may be unethical, but not unlawful. Appellant thus ignores the balance of the court's instruction, which referred to one who has "no lawful claim to [the money], and who knows in his own mind that he does not have a lawful claim" (emphasis added). This instruction— taken as a whole—correctly and unambiguously states the law on claim of right and mens rea.

Second, absent a clear abuse of discretion, the district court's evidentiary rulings must be upheld. The court did not curtail appellant's theory of the case, but merely postponed the introduction of certain evidence until a proper foundation could be laid.

Finally, appellant's objections to the district court's refusal to downwardly depart under the Sentencing Guidelines, and to the Guidelines themselves, are without merit. See United States v. Castellanos, 904 F.2d 1490,1497-98 (11th Cir. 1990)(defendant may not appeal refusal to depart downward); United States v. Harris, 876 F.2d 1502,1504-06 (11th Cir. 1989)(sentencing Guidelines do not violate due process).

AFFIRMED.

# United States Court of Appeals
## FOR THE ELEVENTH CIRCUIT

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JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of conviction of the said District Court and sentence imposed in this cause be and the same are herby AFFIRMED.

Entered: November 5,1991
For the Court: Miguel J. Cortez, Clerk

By:_____
Deputy Clerk

ISSUED AS MANDATE: NOV. 29, 1991